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December 1, 1958. This order, in a proceeding entitled *Preston-Shaffer Milling Co.* v. *Great Northern Railway Co., Union Pacific Railroad Co., Southern Pacific Co., and the Atchison, Topeka & Santa Fe Railway Co.* (Docket No. 32015), established through routes and joint rates for the transportation of wheat and wheat products in carloads from certain points in Montana to points in Oregon south of Portland and in California.[1]

On June 19, 1956, Preston-Shaffer Milling Co. filed a complaint with the Interstate Commerce Commission in which it alleged that the combination rates applicable on wheat and wheat products, in carloads from Cut Bank, Montana, and stations in Montana east and south thereof on the Great Northern Railway Co., to destinations in Oregon south of Portland and in California on the Southern Pacific and Santa Fe (over the route of the Great Northern to Spokane, Washington, the Union Pacific to Portland, and connections beyond), with transit at Milton-Freewater, were unjust and unreasonable in violation of § 1 of the Interstate Commerce Act, and unduly prejudicial to its mill at the said transit point, and unduly preferential of its competitors on other routes as to which joint rates apply, in violation of § 3(1) of the Act. The Commission was asked to prescribe just, reasonable and nonprejudicial joint rates for the future, and, if necessary, to require the establishment of

[1] Of the defendant railroads named in the complaint, only the appellant appeared at the administrative proceeding, and only the appellant has challenged the Commission's order.

through routes under the provisions of § 15 (3) and (4) of the Act. While the case was pending before the Commission, Preston-Shaffer sold its flour mill at Milton-Freewater to Centennial Mills, Inc., which was then substituted as the complainant.

As found by the Commission (Juris. St., pp. 38, *et seq.*) the mill at Milton-Freewater is used primarily in the milling of bakery flour for California commercial bakeries. Such flour is milled from hard spring wheat grown in Montana. About 79% of this wheat originates in the north and north central area adjacent to the lines of the Great Northern, and the remainder is produced along the lines of the Chicago, Milwaukee, St. Paul & Pacific Railroad Co. In the 1955–56 crop year, Preston-Shaffer was able to obtain only about 9% of its requirements from Milwaukee origins. Rates on wheat and wheat products from Montana origins to Pacific Coast points were prescribed in *Grain and Grain Products,* 205 I.C.C. 301 and 215 I.C.C. 83. From the central and north central areas of Montana, a base rate, which, with the subsequent increases, is now 72 cents, was prescribed to Portland. It applies from Montana origins on the Great Northern to Portland, both over the Great Northern "long haul" through Spokane, Wenatchee, and Seattle and, through voluntary arrangement, also via a "through route" with joint rates over the route of the Great Northern to Spokane and the Union Pacific beyond, with transit at Milton-Freewater. However, when traffic originating at these Montana origins and transited at Milton-Freewater moves to destina-

tions in Oregon south of Portland and in California, the rates from Portland to the destinations are added to the 72-cent rate, resulting, for example, in a combination rate of $1.49 to San Francisco and $1.77 to Los Angeles.

The joint rate from the Montana origins to both San Francisco and Los Angeles over existing through routes is 30.5 and 58.5 cents less than the assailed combination rates to those points. The distances over the route via Milton-Freewater compare favorably with those over existing through routes, and no material difference in operating conditions over any of these routes is indicated.

Although the complainant operates mills located on routes over which the joint rates are applicable, it pressed the complaint because the Milton-Freewater mill is engaged largely in the milling of bread flour for the California bakeries. An important consideration in acquiring that mill was the fact that, unlike the complainant's other mills, it is equipped to load cars with bulk flour. Since the handling in bulk form is more economical, some of the large California bakeries are converting their operations to receive flour in that manner, and it is expected to become the common practice.

The Commission found that the marketing of flour is highly competitive, that hard spring wheat is essential to the milling of flour which meets the specifications of the commercial bakeries, and that the producing region of hard spring wheat has been receding to the Montana area served by the Great Northern.

(Juris. St., App. C, p. 49.) Although the complainant's predecessor had been able to remain competitive at points south of Portland and in California by resorting to the substitution of tonnage, the Commission concluded that the changing production picture is making that procedure most difficult. (Juris. St., App. C, p. 49.)

In the light of these facts, the Commission found that the failure of the defendant railroads to establish joint rates over the routes through Milton-Freewater, with transit at that point, is unduly prejudicial to the complainant's mill located there and unduly preferential of competitors' mills located on routes over which joint rates presently apply. It further found that it is necessary and desirable in the public interest that the unlawfulness thus found to exist be removed by the establishment of joint rates via Milton-Freewater, for transit at that point, which shall not exceed the lowest joint rates concurrently in effect from and to the same points over other rail routes. (Juris. St., App. C, pp. 50–51.)

The three-judge district court unanimously dismissed the appellant's complaint to set aside the action of the Commission. (Juris. St., pp. 21–28.) In its memorandum decision, the district court stated (*Ibid.*, at p. 28):

> We have fully considered all of the arguments and contentions of the plaintiff and view them as being without merit. Our conclusion is that the Commission's order is based on adequate findings supported by substantial evidence in the record before it, and that the Com-

mission properly exercised its authority under the law and that its action was not unreasonable, arbitrary, or capricious.

ARGUMENT

1. The appellant argues that the Commission's power under § 15(3) of the Interstate Commerce Act (49 U.S.C. § 15(3)) to compel the establishment of through routes is limited by § 15(4), (49 U.S.C. § 15(4)) which affords carriers certain protection against being short-hauled. Since the Commission here did not make the finding, specified by § 15(4), that the proposed through route "is needed in order to provide adequate, and more efficient or more economic, transportation", it is contended that it could not order the through route between Montana and California and Southern Oregon via Milton-Freewater. But, by amendment to § 15(4), adopted in 1920, 41 Stat. 485–6, the section's limitations on Commission ordered short-hauling were expressly made inapplicable to cases involving "section 3" of the Act. Thus it is clear, as the court below concluded (Juris. St., p. 27), that where, as here, the Commission orders railroads to establish through routes in order to eliminate undue prejudice and preference in violation of § 3(1), the provisions of § 15(4), including the findings otherwise required, are not applicable. See *Baltimore & Ohio R. Co.* v. *United States,* 100 F. Supp. 1002, 1010 (S.D.N.Y., 1951); *Union Pacific R.R. Co.* v. *United States,* 132 F. Supp. 72, 80 (D. Neb., 1954), affirmed in part and reversed in part, on other grounds, *sub. nom. Denver and R.G.W. R.*

Co. v. Union Pacific R. Co., 351 U.S. 321. As the Court stated in the *Baltimore and Ohio* case, *supra:*

> To construe the parenthetical phrase as leaving the prohibition against short-hauling in effect despite a Commission finding of undue prejudice and preference under § 3 would be to deprive it of its apparent meaning. We cannot assume that was the intent of Congress in employing such language. The purpose of the parenthetical phrase seems clearly to permit the Commission to short-haul where it is necessary to avoid an undue prejudice or preference made unlawful by § 3. Hence, without more, the Commission was justified in making its short-haul order.[2]

The appellant suggests that the reference to "section 3" in the 1920 amendment to § 15(4) must be to "subdivisions of Section 3 other than subdivision (1)." (Juris. St., p. 12.) But not only is the controlling language not so limited, as it could easily have been if appellant's construction were valid, but nothing in the context of Section 3 or the legislative history of the amendment compels, or even suggests, such a construction. On the contrary, as the district

[2] Appellant argues (Juris. St., p. 13) that the holding in *Baltimore and Ohio* is *obiter dicta* since there was an alternative ground for the court's decision—the Commission in that case had gone on to make the findings specified by § 15(4) and substantial evidence supported these findings. But as the quotation above makes clear, the court found that the parenthetical reference to Section 3, "without more" justified a short-haul order where undue prejudice or preference was shown.

court concluded in the *Union Pacific* case, *supra* (at p. 80):

> If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3(1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4) heretofore considered. * * *

2. The appellant also contends that since Milton-Freewater, the site of complainant's flour mill, is not located on its lines, but on those of the Union Pacific, there can be no violation of Section 3(1) of the Act which the Commission could order corrected under § 15(3). Relying upon the district court opinion in the *Union Pacific* case, *supra,* which in turn depended, on this point, on this Court's decision in *Central R.R. Co.* v. *United States,* 257 U.S. 247, the appellant argues the admitted disadvantages to Milton-Freewater cannot "be held in law attributable to appellant" (Juris. St., p. 10).[1] Under its theory a carrier, participating in joint rates between specified originating and destination points, may refuse to establish similar rates on other routes between the

[1] Actually, although Great Northern is the only railroad which objected to the Commission's order and although the transit point involved is on Union Pacific's line, all of the railroads involved both in the existing through routes and in the proposed new through route were parties to the proceeding and subject to the Commission's order. Specifically, Union Pacific, on whose line the transit point lies, is a part of one of the existing through routes and participates in the joint rates which were asserted to result in the discrimination. See Proposed Findings, Juris. St., p. 59.

same two points, found by the Commission to be "necessary or desirable in the public interest" in order to eliminate discrimination to a locality on such route, where the locality in question happens to be located on the line of another carrier.

The appellant's argument on this point does violence both to the language and purpose of Section 3(1) which encompasses every type of discrimination among shippers and localities. As this Court pointed out, with specific reference to Section 3(1) in *New York* v. *United States*, 331 U.S. 284, 296, "[t]he principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." The fact that Milton-Freewater is not on the lines of the appellant is not significant under the provisions of § 3(1) so long as appellant "in any respect whatsoever" "cause[s]" the unreasonable advantages to Milton-Freewater's competitor localities, or "subjects" Milton-Freewater to "undue or unreasonable prejudice or disadvantage." As this Court stated in *St. Louis S.W. Ry. Co.* v. *United States*, 245 U.S. 136, 144 in upholding a requirement that carriers establish through routes and joint rates to Paducah no higher than rates to Cairo, though the carriers involved reached Paducah only over connecting lines:

> Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular

> locality is not confined to those whose rails enter it. * * *

See also *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 520 "(If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it.")

Appellant's reliance on the majority opinion of the district court in *Union Pacific R.R. Co.* v. *United States*,* *supra*, is clearly misplaced. That decision cited, as its sole authority for its position, the decision in *Central R.R. Co.* v. *United States*, 257 U.S. 247, 259–260. And this Court has later made clear in *New York* v. *United States*, 331 U.S. 284, the complete inapplicability of the *Central* case to the one at bar. Finding it unnecessary to pass on the contention (also available here) that a "common source of discrimination is * * * sufficient to sustain" an order to fix new rates, the Court stated (at pp. 342–3):

> * * * the principle announced in *Central R. Co.* v. *United States* and *Texas & Pacific R. Co.* v. *United States* [289 U.S. 627] is applicable

* Circuit Judge Johnsen, in dissenting, rejected the majority position that discrimination under § 3(1) cannot exist unless the complainant is located upon the lines of the carrier claimed to have committed the discrimination, finding this position untenable both on the language of the section and in the light of previous decisions on the Court. See 132 F. Supp. at pp. 87–88. The Supreme Court, affirming the Commission's order on other grounds, found "no occasion" to pass upon the point. See 351 U.S. 321 at p. 335.

only where the Commission is directing the carriers to remove the discrimination. Those cases hold that the Commission may not require carriers to do what they are powerless to perform. But the Court recognized in *Central R. Co.* v. *United States, supra,* p. 257, that where the Commission acts pursuant to § 1 to require carriers to establish, in connection with through routes and joint rates, reasonable rules and regulations, that problem is not involved. For then the Commission corrects the unlawful discriminatory practice in the case of each carrier by prescribing the just and reasonable rate or practice. The same is true where, as here, the Commission in order to eliminate territorial discriminations proceeds under § 15(1) to fix new reasonable rates. If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent.

While *New York* v. *United States* involved the prescription of rates under § 15(1), and the appellant makes much of this distinction (Juris. St., p. 14), there is nothing in the principle there announced that would not make it equally controlling where the Commission acts under § 15(3), and, in fact, the Court referred to § 15(3) in its discussion (p. 341). If, as was true in the *New York* case, § 3(1) can reach differentials between territorial rate levels involving many carriers which serve various points in such ter-

ritories, *a fortiori* it would appear to cover the preference and prejudice which results from the refusal of a single carrier to establish through routes and joint rates with another. Here the Commission has not ordered the Great Northern to do anything that it is powerless to perform but simply has directed it to enter into through routes and joint rates with the other railroads, who have not contested the Commission's action, between Montana and points south of Portland through Milton-Freewater just as it has already done between the same Montana points and Portland (see Juris. St., pp. 6–7).

3. Finally, the appellant contends that the evidence is insufficient to sustain the Commission's findings that complainant is unduly prejudiced in violation of § 3 (1) and that through routes are necessary and desirable in the public interest under § 15(3). (Juris. St., p. 16). However, the appellant does not specifically challenge any of the evidentiary findings of the Commission's unanimous report (Juris. St., pp. 38, *et seq.*), which the three-judge district court upheld as supported by substantial evidence in the record, considered as a whole (Juris. St., p. 26). Instead the appellant confines itself to certain general assertions. Thus, it contends that sales in California from the Milton-Freewater plant have increased despite the rate disparity, by the substitution of tonnage. However, the Commission carefully considered this fact and found that the changing production picture is making this procedure most difficult and has subjected the complainant to extra costs (Juris. St., pp. 44–45, 49–50). The appellant also points out that the present com-

plainant, Centennial Mills, Inc., has other mills which have available the joint rates and transit privileges which it seeks for its mill at Milton-Freewater (Juris. St., p. 16). This fact was also considered by the Commission, which noted that the mill at Milton-Freewater has certain facilities, not available at the other mills, which are advantageous in selling to California bakeries (Juris. St., p. 46). In any event, the plant at Milton-Freewater is not excluded from the protection of § 3(1) simply because the owner has mills at other points at which through routes and joint rates are available. Nor is the correction of the discrimination against the Milton-Freewater mill any less necessary or desirable because other competitors, who did not oppose the Commission's action here, might be unable to avail themselves of all the advantages accruing to the Milton-Freewater operation because of their less favorable location in relation to the originating points for wheat. Finally, the appellant points to its financial interest in maintaining the long-haul. Both the district court and the Commission fully considered this fact, and in rejecting the appellant's argument the court observed that "'self-interest of the carrier may not override the requirement of equality in rates.' *United States* v. *Illinois Central Ry. Co.*, 263 U.S. 515, 524" (Juris. St., p. 28).

Having found that the failure of the carriers to establish joint rates through Milton-Freewater with transit at that point, unduly prejudiced the mill located there and unduly preferred competing mills located on routes over which joint rates apply, the Commission properly found that it is necessary and desirable in the public interest that the unlawful dis-

crimination be removed by the establishment of joint rates over routes via Milton-Freewater, with transit at that point. Under the circumstances of this case, the § 3(1) violation could only be removed either (1) by permitting the defendants to disestablish the existing through routes and joint rates from Montana origins on the Great Northern to the destinations in Oregon south of Portland and in California, or (2) by the establishment of joint rates on the described traffic over routes through Milton-Freewater, with transit at that point. But the first alternative would have disrupted the route and joint rate structure that has been in effect for years (Juris. St., pp. 41–42). The second alternative would obviously serve the public interest since it would correct the unlawful discrimination and at the same time maintain the general grain rate structure.

Thus, while the appellant asserts that substantial evidence is lacking to support the order, it is, in reality, attacking the Commission's evaluation of the evidence in determining whether there was undue prejudice and preference, and whether it was in the public interest to require the establishment of the through route to correct the discrimination. These are matters particularly committed to the judgment of the Commission whose function, as guardian of the public interest, "is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit Navigation Co.*,

326 U.S. 236, 241; *New York* v. *United States, supra,* at p. 347.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal presents no substantial question and that the judgment of the district court should be affirmed.*

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
Acting Assistant Attorney General.
RICHARD A. SOLOMON,
JOHN H. D. WIGGER,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
FRANCIS A. SILVER,
Associate General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1959.

* We are authorized by counsel for the Appellee Centennial Mills, Inc. to state that it concurs in this motion.

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REPLY TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1950

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CENTENNIAL MILLS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

REPLY TO MOTION TO AFFIRM

LOUIS E. TORRISON, JR.
Counsel of Record for Appellant
175 East Fourth Street
St. Paul 1, Minnesota

Of Counsel:
ANTHONY KANE
175 East Fourth Street
St. Paul 1, Minnesota

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IN THE

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GREAT NORTHERN RAILWAY COMPANY,
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Appellant,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

REPLY TO MOTION TO AFFIRM

STATEMENT

Under the provisions of Rule 16, paragraph 3, appellant submits this reply to appellees' motion to affirm, which was received September 9, 1959. For convenience we reply first to the second point therein, and then to points 1 and 3.

ARGUMENT

1.

The motion misstates a pivotal argument of appellant. Appellant does not suggest, as appellees put it, that since Milton-Freewater is not located on appellant's lines there can be no violation of Section 3(1) (Motion to Affirm, p. 8). Rather, appellant points out, since it does not hold itself out either alone or in combination with other carriers to furnish transportation on the involved traffic via routes through Milton-Freewater from the origins to the destinations in issue, any disadvantage to complainant's mill at that point cannot be attributable to appellant in violation of Section 3(1).

This question goes beyond the fact that Milton-Freewater is not located on appellant's line. It also goes beyond the fact that the Union Pacific is the carrier which solely controls the granting or withholding of transit at that point.* It goes to the point that appellant simply does not provide, or hold itself out to provide, any service on the traffic in issue via routes through Milton-Freewater to the considered destinations. Any disadvantage to complainant's mill at Milton-Freewater is not, therefore, caused by appellant. "If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers." *Central R. R. Co. v. United States*, 257 U. S. 247, 259. And, if this were not so, the Commission would never have to establish through routes under Sections 15(3) and 15(4) in order to require a carrier

Central R.R. Co. v. United States, 257 U.S. 247, at 255.

to short-haul itself on traffic for transit. (Compare *Pennsylvania v. United States*, 323 U. S. 588, 590, involving the establishment of routes at the behest of an off-line transitor there said to be "deprived of its rightful competitive relation," wherein this Court stated that "the Commission's authority to grant relief" was "bottomed on §15(3) and (4) of the Interstate Commerce Act," not upon Section 3.)

Appellees' argument in essence is like that presented to this Court in *Thompson v. United States*, 343 U. S. 549, where it was said (559):

> "If there is no through carriage over any combination of connecting carriers, the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any route between two points by ordering reduction of the sum of the local rates over that route. Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order."

This Court held in *Thompson* that the protection against short-hauling set forth in Section 15(4) was sufficiently substantial to prevent such a result.

New York v. United States, 331 U. S. 284, is cited by appellees to support their argument that there can be discrimination by a carrier against an off-line shipper which will be held in violation of Section 3(1). However, that case furnishes appellees with no support for the additional argument, which must be substantiated to sustain their motion, that there can be such discrimination in violation of the statute merely from a carrier's nonparticipation with another carrier in a through route which would require short-hauling. In *New York v. United States*, through routes were already

in existence to and from both the points there found to be preferred and there found to be prejudiced, such routes were participated in by the carriers found to be practicing the discrimination, and in the order there under review the Commission, in ordering the discrimination removed, simply exercised its power under Section 15(1) "to establish, in connection with through routes * * * new reasonable rates" (*id.*, p. 342). In other words, it made a rate order, not an order establishing new through routes.

St. Louis S. W. Ry. Co. v. United States, 245 U. S. 136, and *United States v. Illinois Central R. Co.*, 263 U. S. 515, 520, likewise relied upon by appellees in this connection, are similarly distinguishable. In the *St. Louis S. W. Ry. Co.* case it appeared that the appellant rail carriers reached Cairo, the preferred point, by their own rails while contemporaneously, the Court said, such carriers "*bill traffic * * * through to Paducah* [the prejudiced point] *in connection with the Illinois Central*, thus reaching Paducah, although not on their own rails" (emphasis supplied, 245 U. S. 144). No such through billing practice is present here. On the contrary, in the instant case through routes are not in existence and the order assailed would establish them (Motion to Affirm, p. 2; Juris. Statement, pp. 47-48). Similarly, in the other case relied upon, *United States v. Illinois Central R. Co.*, through routes from both the preferred and prejudiced points were already in existence and transportation thereover was performed "as the result of an arrangement between the carriers" (*id.* at 520 and 525).

Neither the establishment of through routes nor short-hauling, both of which are in issue here, was in question in any of the cases cited by appellees on this point.

Appellees also urge (Motion to Affirm, pp. 6-7) that since the words "except as provided in Section 3," which are contained in Section 15(4), are literally broad enough to embrace subsection (1) as well as the other subsections of Section 3, a valid finding that a carrier is in violation of Section 3(1) deprives such carrier of the protection against short-hauling afforded by Section 15(4).

Assuming, *arguendo*, that the Commission had made a valid finding under Section 3(1), appellees' contention that it would deprive appellant of the protection afforded by Section 15(4) is not sound. There is nothing in subdivision (1) of Section 3 which provides or suggests that that subsection relates to the denial or establishment of through routes. On the contrary, the proviso at the conclusion of Section 3(1) prohibits the very construction which appellees urge. That proviso reads:

> "This paragraph shall not be construed to apply to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description."

In *Seatrain Lines, Inc., v. Akron, C. & Y. Ry. Co.*, 243 I.C.C. 199, where the Commission had under consideration the question whether the routing restrictions of certain railroads were discriminatory and prejudicial to shippers desiring to utilize the lines of complainant, in violation of Section 3(1), it said with respect to the proviso above quoted (at 220):

> "The proviso recently added to that paragraph makes it inapplicable to such violations and leaves them to be dealt with under section 3(4)."

Since subsection (4) of Section 3 prohibits carriers from discriminating in "the interchange of traffic between their respective lines and connecting lines," i.e., since that subsection prohibits discriminatory routing, the phrase contained in Section 15(4) reading "except as provided in section 3" has definite meaning when applied to subsection (4) of Section 3. The Commission has specifically held that a violation of that section deprives a railroad of the protection against short-hauling afforded by Section 15(4). *Denver & R. G. W. R. Co. v. Union Pacific R. Co.*, 287 U. S. 611, 658-659, 660, sustained on other grounds in *Denver & R. G. W. R. Co. v. Union Pacific R. Co.*, 351 U. S. 321.

In the instant case, of course, Section 3(4) does not operate as a limitation upon the protection against short-hauling available to appellant because it was not contended here—nor has the Commission found—that appellant is guilty of unlawful discrimination against the traffic of the Union Pacific in its interchange arrangements at Spokane.

3.

The sufficiency of the evidence to sustain the Commission's findings under Sections 3(4) and 15(4) cannot be determined merely by a reference to the Commission's evidentiary findings, as appellees' motion implies (p. 12 *et seq.*). Many of the Commission's evidentiary findings are incorrect or incomplete. For example, the statement at page 3 of the motion that "in the 1955-56 crop year, Preston-Shaffer was able to obtain only about 9% of its requirements from Milwaukee origins in Montana," which in turn is taken from the Commission's report (Juris. Statement, p. 41), is grossly

misleading. The testimony supporting complainant before the Commission showed that in the 1955-56 crop year there were "especially heavy" rains "throughout the central third of Montana," which is reached by the Milwaukee as well as by appellant. These rains "just seemed to wash the quality out of all the wheat produced in that historical area of origin," and it became "necessary for complainant mill * * * along with the other Pacific mills to go into the northeastern portion of the state [not reached by the Milwaukee] to originate nearly all of the spring wheat required" (Commission record, pp. 22 and 75). No such phenomenon was present in earlier years nor in the following year, commencing June 30, 1956, which was referred to at the hearing as "the present crop year" (*id.*). The conclusion is inescapable that normally the Milton-Freewater mill obtains and will continue to obtain much more than 9 percent of its supply from origins on the Milwaukee and that the "production picture" is not "changing" to the extent the Commission apparently supposed (Juris. Statement, p. 49).

In its jurisdictional statement (pp. 16 and 17) appellant points out that the mills of appellee Centennial Mills, Inc., at the points alleged to be preferred over Milton-Freewater comprise 82 percent of its total milling capacity as against 18 percent of appellee's capacity at Milton-Freewater; that the mills at these so-called preferred points sell but 30 percent of their output in California as contrasted with the mill at Milton-Freewater, as to which California sales reach 70 percent of production; and that California sales from Milton-Freewater are increasing. These undisputed facts, which clearly show an absence of undue prejudice, together with other evidentiary matters which cannot be adequately presented to the Court at this stage, will be brought out on

brief to demonstrate that the Section 3(1) and 15(3) findings are completely unsupported.

CONCLUSION

To the extent that matters mentioned in the motion to affirm are not fully answered in this reply, we refer the Court to our jurisdictional statement. For the reasons therein stated and those above set forth, it is submitted that the motion to affirm must be denied.

Respectfully submitted,

LOUIS E. TORINUS, JR.
Counsel of Record for Appellant
175 East Fourth Street
St. Paul 1, Minnesota

Of Counsel:
ANTHONY KANE

Dated September 25, 1959.

PROOF OF SERVICE

I, LOUIS E. TORINUS, JR., one of the attorneys for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 25th day of September, 1959, I served copies of the foregoing Reply to Motion to Affirm on the adverse parties, as follows:

1. On appellee United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable William P. Rogers
Attorney General of the United States
Department of Justice,
Washington 25, D. C.

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Mr. Victor R. Hanson
Assistant Attorney General of the United States
Department of Justice
Washington 25, D. C

Mr. John H. D. Wigger
Attorney
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Mr. Fallon Kelly
United States Attorney

221 Federal Courts Building
St. Paul 2, Minnesota

2. On appellee Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Mr. Robert W. Ginnane
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Mr. Francis A. Silver
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On appellee Centennial Mills, Inc., by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Mr. Samuel J. Wettrick
Attorney-at-Law
Arctic Building
Seattle 4, Washington

LOUIS E. TORINUS, JR.
One of the Attorneys
for Appellant